

KAREN WASHBURN
Claimant

HOPKINS MANUFACTURING
Respondent

ZURICH INSURANCE CO.
CNA INSURANCE CO.

Docket No. 217,353

Before addressing the issues raised on appeal, the Appeals Board will first determine whether it has jurisdiction to review this preliminary hearing order. Whether respondent timely filed its application for review before the Appeals Board is dispositive of this appeal. The record shows the following facts relating to this issue:

- (1) The Administrative Law Judge entered the preliminary hearing Order on February 13, 1998.
- (2) CNA filed its application for review of that Order with the Division of Workers Compensation on March 5, 1998.

The time interval in which a party must file a written request for Appeals Board review of a decision made by an Administrative Law Judge is governed by K.S.A. 1997 Supp. 44-551(b)(1) which provides in pertinent part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

The Administrative Law Judge entered the Order in this matter on February 13, 1998. Accordingly, the effective date of the Order was the day after or February 14, 1998. See K.A.R. 51-18-2. Excluding intermittent Saturdays, Sundays, and holidays, ten days after the effective date of the order was February 27, 1998. See K.S.A. 1997 Supp. 44-551(b)(1). Respondent filed its application for review on March 5, 1998, which was clearly out of time.

CNA was represented by counsel at the February 9, 1998, preliminary hearing and also filed with the Division of Workers Compensation an Entry of Appearance on February 11, 1998. However, CNA did not receive a copy of the Administrative Law Judge's February 13, 1998, Order until the claimant faxed a copy of the order to CNA's attorney on March 5, 1998.

As shown by the order, a copy of the order was not sent to CNA's attorney. Immediately after receiving a copy of the Order from the claimant, CNA filed by fax its application for review with the Workers Compensation Division. CNA asserts that the failure to receive a copy of the Administrative Law Judge's Order was entirely out of its control and was not the result of negligence or irresponsibility on its part. Therefore, CNA argues the Appeals Board should consider its request for review in the interest of justice and further because none of the parties have been prejudiced by the late filing of the request.

The Appeals Board has had previous opportunities to address this issue, e.g., See Rodriguez v. IBP, Inc., Docket No. 169,337 (July 1997). In that case, the Appeals Board noted that some statutes which prescribed the time for an appeal to be filed do permit the extension of appeal time upon a party showing excusable neglect based upon failure to learn of the entry of judgement. See K.S.A. 1997 Supp. 60-2103(a); Schroeder v. Urban, 242 Kan. 710, 750 P.2d 405 (1988). However, K.S.A. 1997 Supp. 44-551(b)(1), the statute which prescribes the time period to appeal a matter from the Administrative Law

Judge to the Appeals Board, does not have language that would give the Appeals Board authority to extend the appeal time. In an Administrative Law Judge proceeding, the time for making an administrative appeal, as prescribed by statute, is jurisdictional and delay beyond the statutory time is fatal to an appeal. State Bank Commissioner v. Emery, 19 Kan. App. 2d 1063, Syl. ¶ 1, 880 P.2d 783 (1994). The Appeals Board concludes it is not necessary to repeat all of the findings and conclusions contained in Rodriguez in this order. Therefore, the Appeals Board adopts those findings and conclusions as if specifically set forth herein.

Accordingly, the Appeals Board finds, that because CNA's application for review was filed out of time, the Appeals Board does not have jurisdiction to review this preliminary hearing Order.

The Appeals Board would suggest that a possible remedy under these circumstances would be for a party to make a request to the Administrative Law Judge to issue a Nunc Pro Tunc Order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the application for review filed by CNA on March 5, 1998, is out of time and should be, and is hereby, dismissed. The Order entered by Administrative Law Judge Floyd V. Palmer dated February 13, 1998, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

c: James C. Wright, Topeka, KS
Wade A. Dorothy, Lenexa, KS
D. Steven Marsh, Wichita, KS
Administrative Law Judge, Topeka, KS
Philip S. Harness, Director